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TAGS: ECPS ECON EINV PGOV MX
SUBJECT: SUPREME COURT RULES IN FAVOR OF COMPETITION IN MEXICO'S BROADCASTING AND TELECOM SECTORS

REF: A. MEXICO 4344
¶B. MEXICO 4291
¶C. MEXICO 3931
¶D. MEXICO 2506
¶E. 06 MEXICO 6542
¶F. 06 MEXICO 1716

¶1. (U) SUMMARY: Below is an analysis and English-language summary of the 900-page final decision by Mexico's Supreme Court (SCJN) that some provisions of the April 2006 Radio and Television Law are unconstitutional. The Court threw out the most blatant anti-competition measures that led the 2006 Law to be dubbed the "Televisa" law because it favored the duopolies Televisa and TV Azteca that dominate broadcasting in Mexico. The Court decision supports competition because it has prevented this broadcast duopoly from becoming stronger by eliminating those provisions that most favored them. We will have to see if President Calderon and Congress will use the space opened by the Court's decision to make changes to actually promote competition in broadcasting and/or other telecom services. The Calderon Administration and Congress will have to decide how public bidding for frequencies can proceed in light of the Supreme Court's ruling against public auctions. The Ministry of Communications and Transport (SCT) is seeking support from the August 20-21 North American Leader's Meeting in order to facilitate its efforts to promote competition at least in some parts of Mexico's telecom sector. End Summary

EMBASSY ANALYSIS OF THE SUPREME COURT'S DECISION:

The key points of the Court's ruling are:

The April 2006 Radio and TV Law is Valid

¶2. (U) The Court ruled that the April 2006 Radio and Television Law is valid, and only declared certain articles invalid.

Foreign Investment Still Not Allowed in Broadcasting

¶3. (U) The Court declined to comment on foreign investment in

broadcasting. The 47 Senators who filed the Constitutional challenge to the Radio and TV Law opposed foreign investment in broadcasting, and believed that the Radio and TV law would allow foreign investment in broadcasting allowing broadcasting companies to provide triple play services (video, data and phone). Their reasoning was that the Radio and TV law's provision allowing broadcasting companies to render "additional telecommunications services" would enable these companies to use the more flexible 2006 Telecommunications Law to allow foreign direct investment in broadcasting. The Court ruling did not give the Senators the explicit rejection of foreign investment in broadcasting that they wanted, but the Court's silence on this point leaves matters under the Foreign Investment Law, which does prohibit foreign investment in broadcasting.

COFETEL, The Telecom Regulator,
is strengthened (But Not Enough)

¶4. (U) By approving those provisions of the 2006 Radio and TV Law that strengthened Cofetel, the Court has given Cofetel more teeth and autonomy. Analysts have said, however, that the Radio and Law TV did not do enough to strengthen Cofetel or make it into a fully independent regulator.

¶5. (U) The Court's decision that the Senate cannot object to the appointment of Cofetel Commissioners was widely expected, but it is unclear what will happen to the legal challenges filed by current Undersecretary for Communications Rafael Del Villar and SCT Director of Legal Affairs Gonzalo Martinez Pous. Rumors abound that the two Commissioners who took Del Villar's and Gonzalez's place when the Senate rejected their nominations will have to step down and President Calderon will bill able to appoint two Commissioners, who would presumably be close to him rather than to former-President Fox or to Televisa and TV Azteca. Del Villar and Gonzalez have said

publicly that they would not seek to become Cofetel Commissioners if they win their challenge.

¶6. (U) The Court ruled that those Cofetel Commissioners who were replaced by new Commissioners under the Radio and TV Law could have been eligible to remain at Cofetel. The Court, however, did not say that the new Cofetel Commissioners should step down, nor that all Cofetel Commissioners must be replaced. Post does not think all Cofetel Commissioners would be replaced because such a move would negatively affect investment.

The Broadcast Duopolies Lose Some Power

¶7. (U) The Court's elimination of Article 28 of the April 2006 Radio and TV law is a step forward for competition. Article 28 would have given broadcasting companies already holding spectrum a strong competitive advantage over new competitors. As digitalization proceeds, Televisa and Azteca would have been able to retain freed-up spectrum and use it for new telecommunications services without bidding and without being explicitly obliged to pay. New market entrants would have had to bid and pay for such spectrum. The Senators who filed the Court challenge believed the Radio and TV Law also favored Telmex by allowing it to instantly provide video services without bidding or having to pay. Telmex, however, is still waiting for government permission to provide video services under the Convergence Accord approved by the Fox Administration (Ref E). (In December 2006, a court rejected the injunction filed by one cable TV company that had blocked Telmex from providing video services. Telmex expects to meet the Accord's requirements for number portability and interconnection, and start providing video services in early 2008.)

The Ruling Promotes Competition

¶8. (U) The ruling on the Radio and TV Law is believed to be the first time the Supreme Court has over-ruled laws that blatantly favor one company, in this case Televisa and TV Azteca. It was also the first time a Supreme Court ruling like this was made completely public, including broadcast on the judicial TV channel of a public hearing before the Supreme Court, and publication on the internet of

the Court's 500-page draft decision and its 900-page final decision. Throughout its ruling, the Court stressed the importance of free competition and made the Federal Competition Commission (Cofeco) a mandatory part of the process of allocating broadcast frequencies.

Unclear how Congress and the
President Will Decide to Allocate
Frequencies

¶9. (SBU) In the short run, however, public bidding for frequencies will remain disrupted by the Court's actions. It remains unclear how public bidding for spectrum will work now that the Court has eliminated "subastas publicas" (public auctions). One of the justifications for the Radio and TV Law was that the old process for allocating spectrum was completely non-transparent, bids for spectrum were not made public and the Ministry of Communications and Transportation (SCT) had complete discretion on which bid to choose. Public auctions is a more transparent process. In fact, one U.S. broadcasting company interested in entering the TV market through partnership with Mexican broadcasters told Embassy Officers that the court challenge to public auctions was a step backwards, because it suspended what progress the government was making in opening at least regional television frequencies for public bidding. The Court did affirm public bidding, however. But since the Court rejected public auctions, the Calderon Administration and the Congress will have to decide how to conduct public bidding for frequencies.

Loopholes Remain

¶10. (U) One of the nine Supreme Court judges Genaro Gongora Pimentel, published his own interpretation of the Court's ruling to explain why he did not agree with the majority. Post agrees with Pimentel that the final ruling was not sufficiently detailed on some key points and left some loopholes that could be misinterpreted by lawyers. Post expects that the Congress will have to fill in these gaps.

Embassy Comment:

¶11. (U) The April 2006 Radio and TV Law, despite its flaws, was a much-needed measure to replace the obsolete radio and television law of 1960. It would have been better for Congress to have passed a more comprehensive reform that did not so blatantly benefit the handful of broadcast companies that already dominate Mexican media and telecommunications. Rather than having been rushed leading into the July 2006 Presidential elections, reforming Mexico's telecommunications and broadcasting should have been a more careful process used to promote competition and allow triple play and technological convergence. Instead, the April 2006 Law was done on a fast track, pushed by Televisa and other economic and political interests. Now that the Supreme Court has eliminated those parts of the April 2006 law that most blatantly stifled competition, it will be up to the Calderon Administration and Congress to pass a new law that allows the competition needed for Mexico's telecom and broadcast systems to move into the modern age.

¶12. (SBU) As indicated by its recent proposal for the North American Leaders Meeting August 20-21 (refs A and B), SCT seems to want to promote some competition in telecommunications. On August 3, during the HLCC U.S.-Mexico telecom negotiations, SCT Secretary Tellez and Undersecretary Del Villar said they were trying to convince Calderon's Office to make a bold proposal at this August Security and Prosperity Partnership (SPP) summit that the Presidents of the U.S. and Mexico and Canada's Prime Minister announce a goal of making the necessary policy and regulatory changes so that telecom carriers can have low cost "local" calling rates regardless of whether the call is within a country or across the U.S.-Mexico border. SCT wants to do this to pressure Telmex to dramatically lower its international "interconnection" rates it charges U.S. carriers to complete a call from the U.S. to Mexico. SCT hopes to strengthen its efforts to promote competition by linking them to efforts under the Security and Prosperity Partnership (SPP) to improve competitiveness in North America. While they may be willing to take on Telmex at least to some extent in order to meet President

Calderon's goal of modernizing telecommunications, SCT is not yet willing to take on Televisa and TV Azteca. SCT officials have been careful to say both publicly and privately that allowing a third national television network would have to be a decision by President Calderon himself.

¶13. (U) Begin Embassy Summary of the Final Ruling:

Title of Ruling: "Constitutional violations and Supreme Court of Justice's ruling re. Telecommunications and Broadcasting Laws"

(1) Complaint from the 47 Senators that filed the challenge): The process in which the law was approved violates the Constitution because it was approved by the Chamber of Deputies with mistakes in the text and sent to the Senate, which changed the text with only a notice from the Chamber.

Ruling: The Court did not agree. The Court ruled that corrections made by the Chamber did not modify the general content of the law, but made it more accurate.

(2) Complaint: The creation of Cofetel is an exclusive faculty of the Executive, and Congress cannot intervene.

Ruling: The Court did not agree. The Court said Cofetel was created by the Executive in a previous decree, so Cofetel as an independent body was not created in this April 2006 Radio and TV Law by Congress.

(3) Complaint: Senators cannot ratify or object to the appointment of Cofetel's commissioners. (Article 9-C)

Ruling: The Court agreed with the accusing party that Senators cannot object to the appointment of commissioners, since this is the

Executive's exclusive right. The Court ruled that the Senate can only ratify the following Executive's appointments: the Attorney General, Ministry of Finance high-level officials; the Army; and Ambassadors. The Court ruled that the Executive will appoint Commissioners.

(4) Complaint: Congress cannot force the Ministry of Communications and Transport (SCT) to issue Cofetel's regulations in a period of 30 days. Congress cannot tacitly eliminate SCT regulations and transfer them to Cofetel, such as broadcasting regulations, which were under the Department of Radio and Broadcasting under SCT.

Ruling: The Court did not agree. The Court ruled that a law is more important than regulations. The Court said that when a previous law is eliminated, its regulations are automatically eliminated. The Court also said that there is no need to establish a period of 30 days since the Constitution obliges the Executive to implement a law. (Embassy Comment: Cofetel and the industry have loudly complained that SCT has so far failed to issue Cofetel regulations for implementing either the 2006 Radio and TV Law, or the 2006 Telecommunications Law. End Comment)

(5) Complaint: The way Congress decided on Cofetel Commissioners over a staggered period violates the Constitution. Although staggered terms is a positive measures to protect Cofetel from the pressure of elections and give continuity to its operations, by approving the reform legislators just wanted to protect Cofetel Commissioners selected by broadcasting companies (duopolists Televisa and TV Azteca) from the new Mexican President (since it was possible that Andres Manuel Lopez Obrador could have won). (Embassy Comment: Obrador was a leftist candidate strongly opposed to most business monopolies in Mexico, and critical of Televisa and Azteca for favoring the ruling party in their TV broadcasts. End Comment).

Ruling: The Court agreed with staggered terms for Cofetel Commissioners.

(6) Complaint: It goes against democracy and equal opportunity of employment that former Commissioners were not eligible to remain in

Cofetel. Congress invaded the Executive's scope of action.

Ruling: The Court agreed with this complaint, ruling that former commissioners could have been eligible to remain in Cofetel. (Embassy Comment: The Court did not say that the former Commissioners should be re-instated. End Comment.)

(7) Complaint: By excluding broadcasting services from the Telecommunications Law and including them under a different law (the 2006 Radio and TV Law), legislators created an exemption regime preventing technological convergence. The reform created a special telecommunications regime for broadcasting services. Under this provision, Telmex would have been allowed to provide "additional" video services not established in its concession contract via its network without being forced to comply with content regulations. The existence of two laws would make it difficult for the Federal Competition Commission (Cofeco) to determine "relevant markets," i.e. to determine monopolies or anti-trust practices. Monopolies would allege that convergent services provided by them were covered by two different laws. On the other hand, existing broadcasting companies would have been allowed to provide telecommunication services through the spectrum assigned to them for broadcasting purposes only, without paying anything in exchange and without bidding for that spectrum (which will be released after the digitalization process). They would have been able to keep the spectrum. Article 28 of the Radio and TV Law provided a preferential treatment to existing broadcasting companies and discriminated against, and represented a trade barrier against, those companies interested in obtaining frequencies to provide telecommunication services since they alone would have to participate in a bidding process.

Ruling: The Court agreed that allowing broadcasting companies to keep and use at no cost the spectrum freed up through digitalization, thereby getting free concessions to provide telecommunications services, would stimulate the creation of monopolies and prevent fair competition particularly for telecommunications companies and new competitors that had to

participate in bidding.

(8) The power granted to Cofetel to sanction dominant companies violates the Constitution because Cofetel cannot determine relevant markets (monopolies and anti-trust practices) in the telecommunications sector. The only authority that can do that is the Federal Competition Commission (Cofeco). The law also failed to determine the sanctions to be applied to dominant companies.

Ruling: The Court did not agree. It said that the 2006 Federal Telecommunications Law establishes in what cases Cofetel can impose sanctions, and that Cofetel can use the concepts established in the Federal Competition Law to determine relevant markets. The Court said it would not be invading Cofeco's scope of action because the Constitution also establishes a prohibition of monopolies.

(9) Complaint: The power granted to Cofetel to collect fees for the right to use spectrum violates the Constitution since this power belongs to the Ministry of Finances.

Ruling: The Court did not agree. The Court said the Constitution does not specify that Ministry of Finance is the only agency in charge of collecting fees for use of such rights. Other government agencies can collect such fees.

(10) The power granted to Cofetel to intervene in international telecommunication violates the Constitution because a responsibility of the Executive Power.

Ruling: The Court did not agree. The Court said that Cofetel, as an independent body but hierarchically subordinated to SCT, can intervene in international matters, and along with the Foreign Ministry to accede to agreements. The Court said this power will be included in Cofetel's internal regulation.

(11) The power granted to Cofetel with regard to broadcasting issues violates the Constitution because it is an issue under the responsibility of the SCT.

Ruling: The Court did not agree. The Court said that Cofetel, as an independent body but hierarchically subordinated to SCT, can oversee broadcasting issues. The Court said that the power to oversee broadcasting issues will be included in Cofetel's internal regulations, and that international standards establish that broadcasting and telecom issues should fall under the same regulator.

(12) Complaint: The fact that broadcasting companies could obtain permission to provide telecommunications services by merely requesting it from the authority without paying anything in exchange, or having to compete for the frequencies, violates the Constitution. The government has the right to administer the spectrum, recover and bid frequencies. (Article 28)

Ruling: The Court agreed. The Court ruled that frequencies have to be granted through public biddings to guarantee free competition and prevent the creation of monopolies. In addition, the government has the right to receive a payment in exchange.

(13) Complaint: The 2006 Radio ant TV Law violates equity principles since it discriminates between broadcasting concessions (commercial companies) and permits (social companies). Those requesting permits have to comply with more requirements.

Ruling: The Court partially agreed.

(14) Complaint: The reform violates the rights of community and indigenous radio broadcasters.

Ruling: The Court did not agree.

(15) Complaint: The accusatory party questioned the use of public auctions based only on economic considerations as the mechanism to grant concessions for the use of spectrum. (Article 17-G)

Ruling: The Court agreed. The Court said this aspect of the law was unconstitutional because it ignored the "social side" of broadcasting services by allowing concessions to be granted only on the basis of economic power and not the public/social role of the broadcaster, the programming, and the effective use of the spectrum. The Court said that granting concessions based only on economic criteria violates the Constitution because it stimulates the creation of monopolies. The Court determined that concessions will be granted according to the congruence between the program and the use of the frequency, as well as the result of the public bidding process.

(16) Complaint: Having two laws, one for telecommunications and one for broadcasting, becomes an obstacle for the Federal Competition Commission (Cofeco) to determine monopolies and implement sanctions in a technological convergence market. Some companies considered to be dominant companies (monopolies) for some services (telecommunications or broadcasting) could use their power to block the entrance of competitors in other markets (telecommunications or broadcasting). Monopolies can allege that there are two different markets: telecommunications and broadcasting.

Ruling: The Court did not agree. The Court said that although there are two laws, both coincide in technological convergence. The Court said that technological convergence will allow a company to provide triple play services. The Court said the April 2006 Radio and TV law links the regulation of broadcasting and telecommunications in accordance with by international standards. The Court said the existence of two laws will not prevent Cofeco from determining monopolies or relevant markets since there are clear rules for such determinations.

(17) Complaint: The fact that broadcasting companies can renew their concessions automatically and keep their spectrum over interested third-parties without the need to bid for it or to comply with new quality requirements violates the Constitution, especially because telecommunication companies have to comply with certain obligations and even new ones imposed by the authority. (Article 28 and 28-A)

Ruling: The Court agreed. Although the Court said that concessions

can be renewed, broadcasting companies have to participate in a public bidding process to renew their concessions.

(18) Complaint: To bid for a concession, companies must have the favorable opinion that the company would not become a monopoly from the Federal Competition Commission (Cofeco). The Radio and TV Law only required that the company provide evidence that it had requested Cofeco's opinion. (Article 17-E V)

Ruling: The Court agreed that this violates the Constitution. The Court said companies must provide a favorable opinion from Cofeco when participating in public bidding for a concession.

(19) Complaint: The reform authorized neutral foreign investment in the broadcasting sector. Only Mexicans can invest in the broadcasting sector (with the exception of cable TV). Since the April 2006 Radio and TV Law considered the provision of "additional telecommunication services," foreigners could use this to invest more than 49% in broadcasting.

Ruling: The Court side-stepped this issue by saying the analysis of this Article is not needed since Article 28, in which broadcasting companies were allowed to provide telecommunication services without bidding for them, was considered to be illegal.

(20) Complaint: Concessions are for 20 years.

Ruling: The Court agreed that concessions for 20 years violate the government's right over the spectrum and its responsibility to administer the adequate and effective use of the spectrum. The Court said that not even the investment made by the industry justifies the 20-year term. The Court suggested changing the text to "grant concessions up to 20 years" in order to give to the government the possibility of not renewing a concession and recovering the spectrum. (Article 16)

(21) Complaint about electoral propaganda/advertising: Only political parties and not their candidates can purchase publicity time from broadcasting companies.

Ruling: The Court did not agree.

BASSETT